THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 13

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JAN J. BZOCH

Appeal No. 97-0737
Application 08/538,554[1]

ON BRIEF

Before McCANDLISH, Senior Administrative Patent Judge, ABRAMS and McQUADE, Administrative Patent Judges.

McQUADE, Administrative Patent Judge.

DECISION ON APPEAL

This appeal is from the final rejection of claims 1 and 3 through 12, all of the claims pending in the application.

The invention relates to "a patient hip guard intended to protect the user against breaking of a hip should the user accidentally fall" (specification, page 1). Claim 1 is

[1] Application for patent filed October 3, 1995.

illustrative and reads as follows:

1. A patient hip guard, comprising:

a) a first hip pad and a second hip pad, each hip pad including a cover defining an internal chamber containing a resilient pad having a relieved region sized and configured in correspondence to a shape of a femoral head of a user's hip and adapted to overlie a femoral head of a user's hip when placed adjacent thereto;

b) a first strap devoid of a hard object attached between said hip pads and being adjustable in length whereby a spacing between said hip pads may be adjusted;

c) a second strap devoid of a hard object attached between said hip pads and being adjustable in length to accommodate to waists of differing sizes; and

d) a rigid pad within the internal chamber engaging a face of a respective resilient pad opposite the relieved region.

The references relied upon by the examiner as evidence of obviousness are:

Flick	835,219	Nov. 6, 1906
Wortberg	4,573,216	Mar. 4, 1986
Valtakari	5,105,473	Apr. 21, 1992
Rice	5,431,623	Jul. 11, 1995

The claims on appeal stand rejected under 35 U.S.C. § 103 as follows:

a) claims 1, 10 and 11 as being unpatentable over Flick in view of Wortberg and Valtakari; and

b) claims 3 through 9 and 12 as being unpatentable over Flick in view of Wortberg and Valtakari, and further in view of Rice.

Reference is made to the appellant's brief (Paper No. 9) and to the examiner's answer (Paper No. 10) for the respective positions of the appellant and the examiner with regard to the propriety of this rejection.

Flick discloses a device for protecting the hips of baseball players when they slide into a base. The device includes a belt 1 having buckles 2 and 6 in the front and back, and pads 3 secured to the belt so as to hang down over the hips and thighs of a user. Each of the pads 3 consists of layers of felt enclosing an inner pad 4 of hair or sea-moss disposed to overlie the hip bone. When a player slides into a base, "the first shock of striking on the hip-bone is taken on the inner pad 4, thus protecting the point of the hip-bone, and as the player slides along the several layers of the pad 3 crumple or slip upon each other, and thus prevent injury" (page 1, lines 66 through 71).

The examiner concedes that the device disclosed by Flick fails to meet the limitations in independent claims 1 and 12 requiring the claimed hip guard to include (1) resilient pads having relieved regions sized and configured in correspondence to the shape of the femoral heads of a user's hips and (2) rigid pads engaging the faces of the resilient pads opposite the relieved regions (see page 4 in the answer). In this regard,

Flick's inner pads 4, which correspond to the claimed resilient pads, do not have such relieved regions and are not associated with any rigid pads.

Wortberg discloses an impact dissipator particularly designed for use as a hip guard. The back of the dissipator carries an adhesive layer intended to adhere to the skin of the user and includes a concave recess 2 shaped to accommodate the greater trochanter so as to facilitate proper alignment and fastening of the dissipator (see column 3, lines 19 through 24).

Valtakari discloses an athletic outfit (trousers and/or a coat) having pockets at various locations, including the hip areas, for receiving protective pads. The pads may be relatively lightweight sheets of elastic material for absorbing shocks or heavier duty constructions wherein the sheets are attached to protective cups made of a material which is highly resistant to blows and rubbing (see column 4, lines 10 through 15).

According to the examiner, it would have been obvious to one having ordinary skill in the art at the time the invention was made "to provide a relieved portion in the pad of Flick as taught by Wortberg in order to facilitate attachment of the hip pad to a wearer" (answer, page 4) and "to add a rigid plastic layer to the outside of pad (4) of Flick as taught by Valtakari in order to

resist blows and rubbing" (answer, page 4).

Given the disparate natures of the various hip protectors respectively disclosed by Flick, Wortberg and Valtakari, however, the appellant's position that the foregoing combination of these references constitutes an impermissible hindsight reconstruction of the claimed invention is well taken. More particularly, modifying the pads of Flick in the manner advanced by the examiner apparently would render them incapable of crumpling as intended by Flick to prevent injury during a player's slide. There is nothing in the combined teachings of the references which would have suggested this result as being desirable. In this light, it is evident that the examiner has used the claimed invention as an instruction manual to selectively piece together isolated disclosures in the prior art to support a conclusion of obviousness. Furthermore, Rice's disclosure of a knee hyperextension orthotic device having hook and loop straps to secure it to a wearer's leg does not cure this fundamental flaw in the basic Flick, Wortberg and Valtakari combination.

Accordingly, we shall not sustain the standing 35 U.S.C. § 103 rejection of independent claim 1, and of dependent claims 10 and 11, as being unpatentable over Flick in view of Wortberg and Valtakari or the standing 35 U.S.C. § 103 rejection of

independent claim 12, and dependent claims 3 through 9, as being unpatentable over Flick in view of Wortberg and Valtakari, and further in view of Rice.

The decision of the examiner is reversed.

REVERSED

HARRISON E. McCANDLISH Senior Administrative Patent Judge	)	
NEAL E. ABRAMS Administrative Patent Judge	)	BOARD OF PATENT APPEALS AND INTERFERENCES
JOHN P. McQUADE Administrative Patent Judge	)	

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